Management System: Office of Chief Counsel

Subject Area: Support and Information Access

Procedure: Electronic Discovery

Issue Date and Revision Number:	Lead Subject Matter Expert:	Management System Owner:
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1.0 Applicability

This procedure for conducting Electronic Discovery (E-Discovery) applies to the Environmental Management Consolidated Business Center (EMCBC) Office of Chief Counsel (OCC) and may affect other offices and sites within the EMCBC at any given time.

2.0 Required Procedure

This procedure provides for the identification, preservation, collection, processing, analysis, review and production of Electronically Stored Information (ESI) during, and in anticipation of, litigation. Reasonable anticipation of litigation arises when the Department of Energy (DOE) is on notice of a credible threat it will become involved in litigation or anticipates taking action to initiate litigation. This procedure may also be applied to address the discovery of traditional paper records, as appropriate.

Step 1	**Assemble a Litigation Response Team (LRT) to ensure a successful launch to the preservation of ESI.** The LRT should consist of members of OCC, Office of Information Resource Management (IRM), Records Management Personnel, and Subject Matter Experts (SMEs), as appropriate. A member of OCC will serve as the team leader and direct the LRT as appropriate. The LRT is responsible for documenting each step of the E-Discovery Process. It is essential that DOE be able to demonstrate that all E-Discovery obligations have been met.
Step 2	**Determine who is subject to duty to preserve ESI.** Individuals who may not destroy ESI and must preserve it are those who have access to, or who may reasonably be expected to have access to, potentially relevant ESI, whether they created it or not. Such individuals include key personnel involved with the specific program/project at issue in the litigation,

	former employees, records managers, and third parties such as Government contractors.
Step 3	**Determine what ESI needs to be preserved and the relevant time-period for preservation.** Categories of ESI include: 1) Electronic communications and transaction information, such as e-mails and cell phone logs; 2) Electronically created and stored documents, such as word processing documents and spreadsheets; 3) Computer databases; and 4) Systems and other information, such as internet access logs. Computer files must be preserved, as they exist on the computer system with all associated metadata. Decisions and reasons underlying the relevant time period in which the preservation is applicable should be documented.
Step 4	**Issue a written litigation hold on all ESI needing to be preserved.** The litigation hold can be issued once it is determined what ESI must be preserved and who must preserve it. The litigation hold must provide sufficient description of the subject matter of the information to be preserved and locations of electronic records likely to contain the potentially relevant ESI. Additionally, the litigation hold must advise the individuals of the pending litigation or similar activity and inform them of their potential liability for non-compliance with the litigation hold. Follow-up with the individuals subject to the litigation hold is necessary to ensure compliance. Litigation hold reminders should be issued on a periodic basis. The litigation hold suspends the destruction of all subject matter related records regardless of the media through which they were created/received. OCC must require employees to certify receipt of, and compliance with, the Notice of Litigation Hold and subsequent reminders. A sample Notice of Litigation Hold is provided as Attachment 1. A sample Reminder Notice of Litigation Hold is provided as Attachment 2. **NOTE:** OCC routinely receives litigation holds from the DOE's Office of General Counsel (GC) or the Department of Justice (DOJ). In these situations, OCC forwards the litigation holds to those individuals subject to the preservation duty and follows any E-Discovery guidance provided by GC or DOJ.
Step 5	**Search and Collect potentially relevant ESI.** Unless there is agreement from all parties to the litigation, ESI must be collected in native file format with all associated media. Based on the Litigation hold request, the LRT should consider using a number of collection methods including employee self-collection, Information Technology-assisted

	collection, such as automated software, and collection by an outside service provider, or a combination of different approaches. The procedure and approaches will vary for each situation based on the type of information being requested. For each litigation hold request, the LRT will define and require the use of standardized, repeatable processes. Required documentation of the methodologies used includes: 1) who made the collection and when; 2) where the information came from; 3) how the information was copied; 4) what errors or irregularities were experienced; and 5) how the information was secured. The LRT will also ensure proper chain of custody is maintained and documented. **NOTE:** In accordance with Federal Rule of Civil Procedure (FRCP) 26(f)(3), the parties are required to confer on any issues related to disclosure or discovery of ESI, including the form of production. In addition to discussing the form of production, the OCC should consider discussing the inadvertent release of privileged ESI and whether or not a "clawback" agreement or a Federal Rule of Evidence 502 Order may be appropriate. In addition, upfront agreement on what keyword and combination of keyword searches are to be used during the collection process, as well as what ESI, if any, is not reasonably accessible, will likely result in a more efficient E-Discovery process.
Step 6	**Process potentially relevant ESI.** The processing of ESI is performed by using specialized software, typically by litigation support personnel or an outside E-Discovery service provider, so that it can be searched in a review tool. Typical processing tasks include extracting files from folders, separating attachments, converting files to formats the review tool can read, extracting text and metadata, and de-duplicating identical files. The processing of ESI may not be necessary in all situations.
Step 7	**Analyze potentially relevant ESI.** The analysis involves evaluating the collected ESI to determine relevant summary information, such as key topics, critical players, specific vocabulary and jargon, and highly relevant documents. The analysis is useful at the outset before detailed review is conducted to help with important early decisions about strategy and to improve productivity. Analysis should be performed throughout the remainder of E-Discovery as new information is obtained and the case evolves.
Step 8	**Review potentially relevant ESI.** The ESI review is a means of identifying relevant documents that require production in accordance with a discovery request, as well as identify privileged documents that need to be withheld. It is during this phase that OCC can begin to gain a better understanding of the factual issues and when legal strategies can emerge and begin to evolve based on the information that is uncovered.

	Review of ESI at this point may be done manually, but it can be time consuming depending on the quantity of ESI to be reviewed. Members of the LRT, other than OCC, may be involved in this review. Computer searches may also be used as a review tool. Potentially relevant ESI that has been processed (Step 6) can be loaded into an electronic database allowing for the numbering and redaction of images of files, for example. Also, predictive coding is a tool that uses iterative processes to teach machines to discern what documents are responsive and/or privileged to reduce the domain of responsive documents to a manageable level. Such alternative tools may be available from IRM.
Step 9	**Produce relevant ESI.** The ESI that is relevant and not privileged should be produced as requested. The ESI should be delivered in the agreed-upon format. All Notice of Litigation Hold forms, subsequent reminders, chain of custody documentation, and all search, collection, process, analysis and review documentation should be maintained in the custody of the LRT for use during the litigation process.
Step 10	**Issue written termination of litigation hold and disband the LRT.** The litigation hold may be terminated when the circumstances giving rise to the preservation obligation no longer exist. All documentation maintained by the LRT should be forwarded to the LRT team leader to be maintained in the OCC litigation file.

3.0 References – Forms/Attachments/Exhibits

3.1 Attachments

- Attachment 1- Notice of Litigation Hold
- Attachment 2- Reminder Notice of Litigation Hold

4.0 Records Generated

Records generated through implementation of this procedure are identified as follows and are maintained by the Office of Chief Counsel in accordance with the EMCBC Organizational File Plan:

Records Category Code	**Records Title**	**Responsible Organization**	**Quality Records Classification (Lifetime or Non-Permanent)**
ADM 14-52a	Litigation Files – Significant	OCC	N/A

	Case Files		
ADM 14-52b	Litigation Files – Intense Public Interest Case Files	OCC	N/A
ADM 14-52d	Litigation Files – Case Files involving personal injuries alleged caused by radiation	OCC	N/A
ADM 14-52e	Litigation Files – Cases other than those described above	OCC	N/A

EMCBC RECORD OF REVISION

DOCUMENT TITLE: **Electronic Discovery**

If there are changes to the controlled document before the two-year review cycle, the revision number stays the same; one of the following will indicate the change:

l Placing a vertical black line in the left margin adjacent to sentence or paragraph that was revised; or

l Placing the words GENERAL REVISION at the beginning of the text. This statement is used when entire sections of the document are revised.

If changes and updates occur at the two-year review cycle, the revision number increases by one.

Rev. No.	Description of Changes	Revision on Pages	Date
0	Initial document in new format	All	1/6/15